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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of SHARON BROWN-
MORK and ANTHONY MORK.

SHARON BROWN-MORK,

Respondent,

v.

ANTHONY MORK,

Appellant.

D045721

(Super. Ct. No. D447481)

APPEAL from an order of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed.

Anthony Mork¹ (Anthony) appeals from an order of the court modifying the amount of his child support obligation, terminating his spousal support obligation to Sharon Brown-Mork (Sharon) and denying an award of attorney fees and sanctions.

Anthony contends the court: (1) abused its discretion and acted contrary to governing law by treating the profits earned by Microspine, Inc. (Microspine), as imputed "income" for purposes of child support under Family Code² section 4058; (2) abused its discretion by refusing to make the order terminating spousal support retroactive to the date Anthony filed his motion to terminate; and (3) abused its discretion by denying his request to impose sanctions against Sharon under section 271. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Anthony and Sharon Brown-Mork (Sharon) were married in 1988 and separated 10 years later. Upon dissolution of the marriage in November 2000, Anthony moved to Florida where he continued to earn a living as a surgeon. The court awarded primary physical custody of Michael, Rickert and Gina (the minors) to Sharon. Anthony received reasonable rights of visitation.

The court found the marriage was barely a marriage of long-term duration. The parties' marital standard was an affluent, upper class standard with an average annual income of \$225,000. Anthony was to pay \$5,000 per month to Sharon for spousal support and \$8,358 per month in child support. The court considered Sharon a highly educated person with experience in the chiropractic field. Based thereon, the court believed one year was sufficient for Sharon to become fully employed within the chiropractic field or any other field. She was directed to make reasonable efforts to become self-supporting.

¹ The parties' first names will be used for purposes of clarity.

In June 2001, the court modified the support payments after Anthony secured a new job. About 10 months later, the parties stipulated to modify support. They agreed to set spousal support and child support at \$2,177 per month and \$3,619, respectively.

In May 2003, Anthony filed an order to show cause (OSC) to modify custody, visitation and support. He requested primary custody of Michael and Gina be awarded to him. Anthony claimed he had received telephone calls from his children during which they complained about the lack of care and the chaotic situation in Sharon's home. He further claimed Sharon continued to thwart his visitation time and she had not provided the court-ordered monthly progress reports concerning the children. Anthony noted Sharon received \$5,000 per month in child support from the father of her other child.

In her response, Sharon opposed change of custody and modification of support. She claimed Anthony owned a closely held corporation and he had not disclosed its earnings or other compensation. She further claimed she had been the primary caretaker of the children during the marriage and did not work.

In August 2003, Anthony testified at his deposition concerning his interest in Microspine, a closely held corporation.³ He disclosed he had a 60 percent ownership interest in the corporation and a 50 percent voting interest. Microspine profited in the first quarter of 2003, but Anthony stated he had not personally received any profits in excess of his \$16,666 monthly salary that he received from his current employer, Emerald Coast Medical Services, Inc.

² All further statutory references are to the Family Code unless otherwise specified.

In December 2003, Anthony amended his OSC requesting he be granted primary custody of all three minors. Relating to the financial issues raised in his OSC, Anthony argued he separated from Sharon in October 1998 and he been paying spousal support for over five years. He alleged his net income per month was \$10,470 and that his expenses were \$8,600 per month including child support. Anthony claimed that although Microspine had earned profits, no payments of dividends or bonuses were contemplated and he did not receive any distribution of the corporation's earnings. In addition, the chief executive officer of Microspine, Doug Drumwright, testified Anthony had not received any compensation from the company other than his salary. Microspine's cash reserves instead had been earmarked to be used for the opening of new surgery centers.

In support of his argument that spousal support should be terminated, Anthony argued Sharon's financial situation had improved. She received \$5,000 per month in child support from the father of the fourth child and \$5,796 from Anthony in spousal and child support. Anthony further argued Sharon had the ability to earn income as a chiropractor. In addition, her expenses were at minimum as she no longer had to make mortgage or car payments.

In December 2003, the court found it essential to the welfare of Michael to have extended visitation with Anthony from January through May 2004. In July 2004, following a three day hearing, the trial court rendered a statement of decision awarding custody of the three minors to Anthony. The minors went to live with Anthony in Florida. Sharon's timeshare of the minors was reduced from primary custody to about

³ Microspine receives income in its capacity as a surgical facility.

22.5 percent of the time. The court set a visitation schedule with respect to Sharon and the hearing to address the remaining financial issues at a later date.

Anthony and Sharon subsequently filed separate income and expense declarations. Sharon's attorney filed a declaration stating the trial testimony showed Anthony had earned \$1.2 million dollars in 2003 based on profits made by Microspine. In September 2004, the court heard final arguments relating to support payments. Anthony argued he did not have control of Microspine because he only had 50 percent voting rights. He received a salary but no other funds were to be distributed to him. Sharon argued Anthony owned 60 percent of Microspine and his share of the profits in 2003 averaged \$84,000 a month.

The court issued a statement of decision and ruled the 60 percent of Microspine profits should be attributed to Anthony. The court found Anthony's monthly earnings to be \$69,136 based on Microspine's profits in addition to his gross salary income of \$16,666 per month. The court further found Sharon to be unwilling to re-enter the work force based on the fact Sharon had made no attempt to pursue meaningful employment, whether in the chiropractic field or some other field. Accordingly, the court ordered the termination of spousal support. The court set child support payments in the amount of \$2,490 per month and denied Anthony's request for fees in the form of sanctions under section 271 finding the absence of good cause.

DISCUSSION

I

ANTHONY'S INCOME AND CHILD SUPPORT AWARD

Anthony contends the \$2,490 per month child support award must be reversed. He asserts that in calculating the support award, the court abused its discretion by treating the earnings generated by Microspine as imputed "income" under section 4058.⁴ The court's finding of his net monthly income based on Microspine's earnings is incorrect because he never received any income from Microspine. Anthony further asserts imputing income from Microspine to him would not be in the best interests of the children.

A

Applicable Legal Principles

We review child support awards under an abuse of discretion standard. (*In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 128.) "We cannot substitute our

⁴ Section 4058, subdivision (a) provides in full: "(a) The annual gross income of each parent means income from whatever source derived, except as specified in subdivision (c) and includes, but is not limited to, the following: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article. [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business. [¶] (3) In the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts."

judgment for that of the trial court, but only determine if any judge reasonably could have made such an order. [Citation.] Our review of factual findings is limited to a determination of whether there is any substantial evidence to support the trial court's conclusions. [Citation.]" (*Ibid.*) On appeal, a judgment or order of the superior court is presumed to be correct with all reasonable inferences indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

In exercising its discretion, the trial court is required to recognize and consider the purposes of the law regarding child support and the statutes and rules concerning such a highly regulated area of law. (See *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283 (*Cheriton*).) As the court in *Cheriton* noted: "California has a strong public policy in favor of adequate child support. [Citations.] That policy is expressed in statutes embodying the statewide uniform child support guideline. [See §§ 4050-4076.] 'The guideline seeks to place the interests of children as the state's top priority.' (§ 4053, subd. (e).) In setting guideline support, the courts are required to adhere to certain principles, including these: 'A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life.' (§ 4053, subd. (a).) 'Each parent should pay for the support of the children according to his or her ability.' (§ 4053, subd. (d).) 'Children should share in the standard of living of both parents. . . .' (§ 4053, subd. (f).)" (*Cheriton, supra*, 92 Cal.App.4th at p. 283; fn. omitted.)

Subject to certain statutory exceptions not applicable here, section 4058, subdivision (a) defines a parent's "gross income" as "income from whatever source

derived...." Although the statute then lists more than a dozen possible sources of income, its express terms indicate that the list is not exhaustive. (§ 4058, subd. (a) ["The annual gross income of each parent means income from whatever source derived . . . and includes, but is not limited to, the following Income from the proprietorship of a business"]; see also *Cheriton, supra*, 92 Cal.App.4th at p. 285.) Rather, income for purposes of determining child support has been broadly defined with judicially recognized income sources covering a wide range that are not limited to a parent's actual earned income. (*Cheriton, supra*, 92 Cal. App.4th at pp. 285-286.) "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (Fam. Code, § 4058, subd. (b).)

B

Analysis

The court here did not abuse its discretion by imputing income to Anthony based on his ownership in Microspine. As the court concluded in *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1396 (*Destein*), trial courts have the discretion to attribute income to investment assets. In addition, in order to provide adequate child support, public policy has led to an expansive use of the earning capacity doctrine in setting the level of support when consistent with the needs of the child. (*In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 1372.) The court in *Destein* reasoned that as long as a parent has an earning capacity, meaning the ability and the opportunity to earn income, the trial court may attribute income. (*Destein, supra*, 91 Cal.App.4th at p. 1392, citing *In re Marriage of Regnery, supra*, 214 Cal.App.3d at p. 1372.)

Here, the court acknowledged Anthony testified the profits from the corporation were placed back into Microspine with the purpose of pursuing the future growth of the corporation. The court, however, analogized Anthony's ownership interest in the corporation "to a situation in which a rental property owner holds all of the net income from that property in a segregated account with the intention to purchase other property with those monies, or to the situation in which an employee has vested but unexercised stock options. In both of those situations a court may reasonably find income available for support." Based on this reasoning, the court concluded Anthony's ownership and voting or control rights served "to shield from the Court's consideration monies that would otherwise be available for support. . . . To determine that such income were not available for support would allow virtually any business-savvy parent to reduce or avoid his support obligations through the artful crafting of incorporation documents or the like." Under the terms of section 4058, subdivision (a)(1), the court found Anthony's ownership in Microspine would be considered income for support purposes.

Anthony argues the trial court abused its discretion by imputing income where he had not actually received any of Microspine earnings. Admittedly, Anthony testified Microspine had profits but he had not received any income out of these profits. This does not negate the fact Anthony holds 60 percent ownership in Microspine, a corporation that earned in excess of \$650,000 for the first two quarters of 2004. Therefore, Anthony's overall net worth is in excess of his \$16,666 monthly salary. Further, even though the court found Anthony's self-employment income from Microspine to be \$69,136, the monthly child support award ultimately ordered by the court was in the amount of

\$2,490. The court's determination of this amount is reasonable in light of Anthony's total earnings and the fact Sharon will still continue to share the custody of the minors for about 22.5 percent of the time. In addition, taking into consideration the affluent lifestyle of the family before the parties' separated (§ 4053, subd. (d)), the court's interest in placing the children's needs as a top priority (§ 4053, subd. (e)), and Anthony's overall earning capacity, imputing income from Microspine was proper. (See *Cheriton, supra*, 92 Cal.App.4th at p. 283; see also *Destein, supra*, 91 Cal.App.4th at p. 1392.) The court did not abuse its discretion.

II

THE COURT PROPERLY REFUSED TO RETROACTIVELY ENFORCE THE SPOUSAL SUPPORT TERMINATION ORDER

Anthony next contends the court erred by refusing to make the spousal support termination order retroactive to May 2003, when he first filed his OSC seeking to terminate his spousal support obligations.

A

Background

In May 2003 Anthony filed his OSC seeking, among other things, the termination of Sharon's spousal support payments. He asserted his marriage was barely a "long-term" marriage. He further noted in September 2000, the court noted Sharon had the ability to earn and attributed to her \$3,000 per month in gross income. However, Sharon had not made attempts to become self-supporting.

After several continuances, the court first heard the issue of spousal support termination in February 2004. The court reviewed the evidence and heard argument from counsel. The court stated its "tentative right now is to terminate spousal support [The] tentative is to accept the chiropractor job as being a realistic possibility and a realistic opportunity for [Sharon.]" The court decided to wait and review the results of the family psychological evaluation to ascertain whether Sharon had the ability to earn income.

In October 2004 the court issued its statement of decision terminating spousal support on several grounds, including: (1) the marriage between Anthony and Sharon was a long-term marriage of just over 10 years and Anthony had been paying spousal support to Sharon since 1998; (2) Sharon had made no effort to seek employment since the dissolution of the marriage despite the court's instructions directing her to seek employment; (3) Sharon had a significant reduction in living expenses; and (4) Sharon's justified imputed income had significantly increased. The court further noted the fact Anthony had primary custody of the three minors and had them in his care about 80 percent of the time. The court refused to make its termination of spousal support award retroactive to May 2003 based upon the nature of the bases for the reduction and the timing of the court's previous custody determination.

B

Applicable Statute and Analysis

Section 3653, subdivision (a) states "[a]n order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to

show cause to modify or terminate, or to any subsequent date[.]" The language stating that the order "*may* be made retroactive" is clearly permissive and vests the trial court with discretion to make the modification order retroactive to the date of filing "or to any subsequent date." (§ 3653, subd. (a); see also *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 174-175.)

Anthony asserts the factors relied upon by the court to grant his request to terminate spousal support were all present during the entire period for which the retroactive decrease was sought, except for the transfer of primary custody of the minors from Sharon to Anthony. In other words, there was no distinction in the facts during the retroactive period from May 2003 to October 2004. However, the trial court noted there was a distinction in the facts during this period of time. Sharon initially had the primary custody over the minors at the time of the dissolution of the marriage. This remained the arrangement until the court awarded primary custody to Anthony in July 2004, about three months before the court terminated spousal support. Further, the trial court did not have a completed psychological evaluation at the time of the initial February 2004 hearing. The court noted it preferred to review the evaluation which would address Sharon's ability to earn before addressing the issues of support. The court expressed concern over taking the assumption that Sharon would have an ability to earn income when in fact, she might not. After taking into consideration Sharon's ability to earn and the change in primary custody which occurred in July 2004, the court exercised its discretion and denied retroactivity. The court did not err by denying Anthony's request. (See *In re Marriage of Petropoulos*, *supra*, 91 Cal.App.4th at pp. 174-175.)

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING ANTHONY'S REQUEST FOR SECTION 271 SANCTIONS

Anthony asserts the court abused its discretion by denying his request for attorney fees as sanctions against Sharon under section 271. He contends Sharon should be sanctioned for repeatedly engaging in obstructive conduct. Specifically, Anthony asserts Sharon delayed the case by changing attorneys three times since he filed his May 2003 OSC. She further refused to cooperate with a family psychological study, court ordered therapy, drug testing and interfered with Anthony's visitation of the children.

A

Section 271 allows an award of attorney fees as a sanction when the conduct of a party frustrates the law's policies of promoting settlement and of promoting cooperation to reduce the cost of litigation. (§ 271, subd (a); *In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1110.) "An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award." (§ 271, subd. (a).)

Generally, an order denying sanctions under section 271 is reviewed under an abuse of discretion standard. (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.) "[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order . . . ' [Citations.]" (*In re Marriage of Daniels, supra*, 19 Cal.App.4th at p. 1106.)

B

In his May 2004 declaration in support of a request for section 271 sanctions against Sharon, Anthony states Sharon engaged in various delay tactics necessitating several continuances of his March 2003 OSC. First, we reject Anthony's claim that Sharon deliberately frustrated the settlement of litigation by changing her attorneys on three occasions. Sharon did not appear to deliberately seek new counsel but instead sought new counsel after her attorneys filed motions to withdraw. Sharon's first attorney filed a motion to withdraw in October 2003. By late November 2003, Sharon retained James Clark. At that point, she requested a motion to continue the OSC. The court granted the request. In March 2004, James Clark filed a motion to withdraw. By late April 2004, Sharon had retained new trial counsel, William Blatchley.

Second, the terms of section 271 authorize an award of attorney fees and costs as sanctions. (§ 271, subd. (a).) It does not allow the imposition of sanctions in excess of the costs and attorney fees actually incurred by the nonoffending party. Nor does it allow sanctions to be imposed to cover other types of losses unrelated to costs and attorney fees. Anthony claims Sharon refused to take a drug test, blocked telephone calls between him and the children, and failed to take the children to therapy. We find nothing in the

record to support how these claims would result in Anthony incurring additional attorney fees or how these actions frustrates the law's policies of promoting settlement when the record shows the parties were not on the path to settlement. (§ 271, subd. (a).) Further, these acts in and of themselves do not constitute "reprehensible" or "obstreperous" conduct justifying the imposition of sanctions under section 271. (See *In Marriage of Norton* (1988) 206 Cal.App.3d 53, 59; *In re Marriage of Daniels*, *supra*, 19 Cal.App.4th at p. 1110.) The trial court could have reasonably found Sharon's conduct is not within the realm of conduct that warranted sanctions in reported cases. (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 27-29 [husband repeatedly delayed paying judgment by bringing in excess of a dozen appellate court proceedings].) The court did not abuse its discretion.

DISPOSITION

The order is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.